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ABSTRACT

Part of the curriculum materials prepared by the National Paralegal Institute under a Federal grant, the document focuses on the paralegal, or legal assistant, role in civil and criminal litigation. Chapter 1 outlines and describes procedures governing both criminal and civil cases for stages of: (1) agency, (2) pre-trial, (3) trial, (4) appeal, and (5) enforcement. Chapter 2 introduces the reader to litigation assistantship responsibilities and includes a checklist to assist the paralegal in creative observation. The remaining five chapters focus on the litigation assistantship role during agency, pre-trial, trial, appeal, and enforcement stages. A checklist for analyzing/digesting deposition testimony and answers to interrogatories is included as well as guidelines for preparing physical evidence and exhibits for trial, drafting interrogatories, and responding to interrogatories. (EA)

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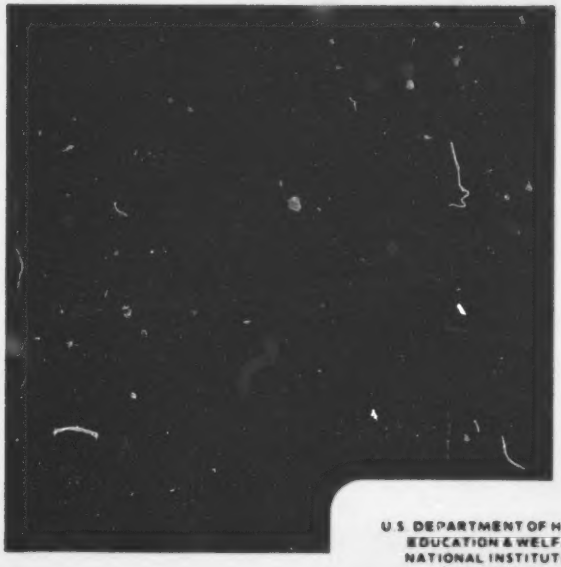

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# Introduction to Civil and Criminal Litigation: Roles for the Paralegal

by
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# CHAPTER ONE

## STAGES OF LITIGATION

Litigation is the process of resolving controversy through the courts and/or through the quasi-judicial proceedings of administrative agencies. "Quasi" means "like" or "similar to." The word "judicial" refers to the operation of the courts. An agency proceeding which is "quasi-judicial" is one in which the agency is acting like or similar to a court such as through its administrative hearings.[1] While the word litigation is sometimes meant to refer only to court proceedings, the interplay between courts and agencies is often so strong in litigation that the word is used here to include the quasi-judicial dispute settlement mechanisms of agencies. Civil litigation involves conflict between one person and another or between the government and a person when a crime is not at issue. Criminal litigation involves a government's attempt to prove that a person is guilty of a crime. Litigation can have five stages: agency, pre-trial, trial,

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[1] See Statsky, W., Introduction to the Legal System: A Short Story for Paralegals, p. 9, 41 (National Paralegal Institute, 1974)

appeal and enforcement.

These five stages are activated only when the conflict is brought to the attention of a government official or agency. Many, if not most, of these conflicts are never brought out into the open in this way. For example, take the case of a neighbor chopping down his tree which falls onto someone else's property. A civil suit (e.g., trespass) would certainly be possible on these facts. The neighbors, however, may decide between themselves to settle the matter, e.g., the neighbor who did the tree cutting may remove the tree from his neighbor's yard and take it upon himself to repair any damage. The courts never become involved. An employee is caught stealing a small amount of money. The employer may decide to "let him go" without calling in the police. He may be reprimanded or discharged after making restitution (e.g., returning the money taken). The prosecutor or district attorney never hears about the case. A vast number of civil cases and a good number of criminal cases are resolved in this fashion; they are never litigated.

## 1. Agency Stage (See Chart 1)

### a) Criminal Cases

Before the criminal courts become involved in a case, the police department or district attorney's office have usually taken some action. The police department and the district attorney's office are administrative agencies although the latter is not often referred to as an agency. Unless a citizen is making the arrest, the decision to arrest is usually made by the police. The initial decision on whether or not to prosecute (i.e., to proceed against a person criminally) is made by the district attorney. The police do not arrest everyone whom they suspect have committed a crime, nor does the district attorney prosecute everyone arrested. They have considerable discretion with respect to the arrest and prosecution decisions. The individual involved, (himself or through his attorney,) may bring certain facts to the attention of the police or district attorney in order to influence their decisions on whether to arrest or prosecute.

### b) Civil Cases

In civil cases, the process is much more complex if an agency is involved. There may be no agency in existence, however, with

jurisdiction[2] over the dispute. An automobile accident or an estate problem, for example, normally does not involve an administrative agency; they go directly to the courts if the parties have not resolved the conflict among themselves. Other civil cases do involve agencies, e.g., suspension of drivers license (Department of Motor Vehicles), tax claim (Internal Revenue Service), stock issue (Securities and Exchange Commission), welfare claim (Department of Social Services). Disputes involving such matters may eventually find their way into the courts, but under the doctrine of the exhaustion of administrative remedies,[3] the parties normally must go through the procedures set up by the agency to try to resolve the dispute within the agency before taking it to the courts. After exhausting (going through all) administrative remedies (procedures designed to resolve conflict), if the party is still dissatisfied with the decision of the agency, he can normally take the case to the courts.

Agencies have informal and sometimes formal internal dispute settlement mechanisms. Informally, an agency employee may be available on the phone, through the mail or in person to listen to the side of the client. Many disputes are resolved at this level. Misunderstandings are cleared up, missing facts are provided, etc. Many times the client is representing himself at this stage. If he is still dissatisfied with the agency decision,

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[2] Supra note 1 at p. 55.

[3] Id at p. 10.

he may seek the assistance of counsel or other representative. The client or his representative may go back to the individual who made the initial decision and try to change his mind. If unsuccessful, he may go up the "chain of command"[4] to his supervisor in a further effort to resolve the matter informally. If the informal channels prove unfruitful, recourse may be made to the quasi-judicial hearing procedures of the agency. The agency may have a hearing process in which evidence is presented, witnesses sworn, etc. in a fashion similar to a court hearing or trial. A deciding officer or referee will then make a decision. If the party is dissatisfied with the decision, he may be able to petition for a re-hearing before the same referee. Finally, an appeal process may be available within the agency to another referee, or to another body or to the director of the agency himself who may have the power to overrule any decision made. Once all these routes have been exhausted, the individual may be able to take the case to court if still dissatisfied. Some agencies do not have formal quasi-judicial tribunals in this manner. To exhaust administrative remedies in such agencies simply means to go through whatever process that is available in order to give the agency a chance to resolve the matter.

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[4]See Statsky, W., Teaching Advocacy: Learner-Focused Training for Paralegals, p.39 (National Paralegal Institute, 1st Edition: 1973; 2nd Edition: 1974+. See also Statsky, W., "Paralegal Advocacy Before Administrative Agencies: A Training Format," University of Toledo Law Review (1973).

## CHART 1

## STAGES OF LITIGATION: AGENCY

| CIVIL | CRIMINAL |
|---|---|
| a) The client and/or his representative may try to contact agency officials to resolve the conflict informally.<br><br>b) Recourse may be made to upper echelon officials at the agency to resolve the conflict informally.<br><br>c) A formal agency hearing may be held in which witnesses are sworn, testimony taken on direct and cross-examination, documents submitted into evidence, etc.<br><br>d) If possible, a re-hearing may be requested.<br><br>e) An appeal might be taken within the agency to whomever has the final word. | a) The individual or his attorney may try to influence the exercise of the police's discretion on whether to arrest.<br><br>b) The individual or his attorney may try to influence the exercise of the district attorney's discretion on whether to prosecute. |

## 2. Pre-Trial Stage (See Chart 2)

a) Criminal Cases

Different jurisdictions often have different pre-trial criminal procedures. The process described here is typical of many states. Once an individual is arrested, the prosecutor must act quickly in deciding whether to prosecute since the individual has a right to be brought before a magistrate[5] soon after he is arrested. Delay sometimes occurs, however, in bringing the accused before a magistrate due to the time taken by the police to complete their investigation. The magistrate notifies the accused of the charge or complaint against him. He also decides what must be done with him until the next court proceeding. Two options are available:

(i) he can be released on his "personal recognizance" without having to post bail;

(ii) he can be released only if bail is posted.

Bail is a sum of money paid into court which is forfeited if the accused fails to appear at scheduled court proceedings.

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[5]The word "magistrate" can have a number of different meanings. Here it refers to a lower court official who may or may not be a judge. His primary function is to conduct the initial court proceedings.

> Normally, the accused will have a bondsman post the bail for which the accused pays the bondsman a non-returnable fee. In some states, the court will allow the accused to pay into court a designated percentage of the total bail imposed.

The accused is also notified of his right to remain silent, to hire an attorney or to have an attorney assigned to his case free of charge if he is indigent.

Many misdemeanor[6] or petty cases never go beyond this stage. A majority of defendants plead guilty immediately.

At the initial appearance in felony cases, the magistrate asks the accused whether he wants a preliminary hearing or examination. If he wishes one, a date is set for it. In some jurisdictions, the accused has the right to be prosecuted only after a grand jury has returned an indictment. Both the preliminary hearing and the grand jury process can be and often are waived by the accused.

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[6] States have different criteria on which they base a distinction between a felony and a misdemeanor. For example, the distinction may be based on the length of the sentence that could be imposed or the place of institutionalization that could be ordered if convicted. Generally, a felony is a more serious crime than a misdemeanor.

The purpose of the preliminary hearing is to permit the court to decide whether there is sufficient evidence of guilt to justify a trial. Careful analysis of the evidence is a rarety, however, at this hearing. Its primary value to the accused is the opportunity to discover or learn more about the evidence that the prosecutor has and that he might attempt to establish at trial. This information can be invaluable to defense counsel in preparing for trial.

A common occurrence during the preliminary hearing (although not limited to this stage) is plea bargaining. Suppose that the accused has been charged with burglary and assault. In a bargaining session, he may "agree" to plead guilty to one of the charges if the other is dropped. A great number of criminal cases never go to trial because of the bargained convictions that are obtained in this way.

In about half the states (mainly in the West) the preliminary hearing is the last screening stage before trial. In the other states and in the federal system, the grand jury can enter the picture before trial. The grand jury process is similar to the preliminary hearing in that a decision is made on whether sufficient evidence exists to hold the accused over for trial. Its decision to prosecute comes in the form of an indictment.

The next step is the arraignment. The accused is formally given the opportunity to plead to the charges against him at the

arraignment. The usual pleas are guilty, not-guilty or "nolo contendere" (or "no contest") which is not an admission of guilt but a statement that the accused does not dispute the charge. If the defendant does not plead guilty, a date for trial is set. During this stage, there again is often considerable discussion of plea bargaining deals.

Throughout this process, but particularly toward the end as the trial date approaches, the defendant or his attorney often makes motions which are petitions or requests to the court that certain things be done. For example, a motion for discovery is a request that the court order the prosecutor to provide the defendant with certain information concerning the case. A motion to suppress is a request that the court refuse to permit the prosecutor to use certain evidence.

If the accused has requested a jury trial, a "voir dire" proceeding is held before the judge in which prospective jurors are interviewed by the attorneys for selection to the jury on that case.

b) Civil Cases

The procedures governing civil litigation can vary extensively from state to state--usually much more so than criminal litigation. What is presented here are the procedures that generally apply to many jurisdictions.

To commence civil litigation, the plaintiff files a complaint which states the main facts that he alleges against the defendant. Pleadings are the formal papers filed by plaintiffs and defendants containing their positions on the factual and legal issues in litigation. The complaint is the plaintiff's first pleading filed. It is filed with the clerk of the court who then issues a summons which is a notice to the defendant that a civil suit (called an action) has been filed against him and that unless he answers the complaint within a designated time, he will lose the case by default. The plaintiff then has this summons plus a copy of the complaint "served" on the defendant. To be served normally means to be handed something in person, although in special circumstances service may be made in other ways, e.g., through mail or notice in newspaper. The person who completes this service on the defendant then files with the clerk of the court an "affidavit of service" in which he swears that service has been made.

The defendant must then file an answer in order to avoid a default judgment against him. He may take a number of positions in the answer. For example:

a) Demurrer: a statement that even if all of the facts alleged in the plaintiff's complaint are true, the law governing those facts would not permit the plaintiff to win anything. In other words, the defendant is claiming that the plaintiff has not

stated a "cause of action."

b) Admissions and Denials: When the defendant reads the facts alleged to be true by the plaintiff in the complaint, the defendant may decide to admit the truth of some of the facts and deny the truth of others.

c) Counterclaim: the defendant may feel that he has his own cause of action against the plaintiff. If so, he states the facts that he believes entitles him to recover against the plaintiff.

The defendant may try to join other parties to the action whom he believes are liable or otherwise involved. It is the responsibility of the defendant to serve the summons on these parties.

Once the plaintiff receives the answer of the defendant he usually files a reply stating his position with respect to what the defendant said in the answer.

The next major stage is discovery. Discovery procedures are used to permit the parties to obtain more facts from each other in order to prepare more effectively for trial. Written interrogatories are questions addressed to a party in which information pertaining to the claims in litigation is sought. A more formal way in which greater factual detail is obtained is through a bill

of particulars. A deposition is a question and answer period before trial and outside the courtroom (usually in one of the attorneys' offices). A party or witness in the case is questioned by counsel again with the objective of discovering facts for purposes of preparation.

While discovery is going on, a number of motions may be made by the parties to the court (before the trial begins). As indicated above, a motion is a written or oral application by a party addressed to the court requesting a particular order or ruling. For example, a "motion to disclose" is a request by one party for the other to disclose certain information or to hand over certain documents that have not been obtained through the normal interrogatory and deposition process. A "motion to dismiss" or a "motion for summary judgment," is a request to end the case without a trial. A party is saying to the court that if it looks at every document and pleading that has been submitted thus far, the other side could not possible win at a trial.

Throughout this pre-trial period, the parties may be trying to negotiate a settlement. A bargaining process takes place privately between the parties, or between the attorneys of the parties, during which each side tells the other what it thinks it would be able to prove at trial, why the other side should settle and what it is prepared to settle for.

The pre-trial conference is held before the judge (usually in his office or private chambers) with the attorneys present. They talk about the general outline of the pending trial. The judge trys to get the attorneys to be more precise in the identification of the issues that will be the subject of the trial. The judge may also use the opportunity to encourage the parties to try to settle the case or to attempt arbitration.

In certain situations there are arbitration procedures available to the parties. In arbitration, the parties agree to submit their dispute to a non-judicial third party and to abide by his decision on the dispute. This is a separate proceeding from the court process.

If the case will go to trial and a jury has been asked for, there must be a jury selection process--the "voir dire."

## CHART 2

## STAGES OF LITIGATION: PRE-TRIAL

| CIVIL | CRIMINAL |
|---|---|
| a) Plaintiff files complaint with clerk of court.<br><br>b) Clerk issues a summons.<br><br>c) Summons and copy of complaint are served on the defendant.<br><br>d) Plaintiff files an affidavit of service with the clerk of court.<br><br>e) Defendant then files an answer with the clerk of court with a copy servied on the plaintiff. The answer could contain a number of positions:<br><br>1. demurrer<br>2. some admissions of fact and some denials<br>3. counterclaim.<br><br>f) Third parties may be joined.<br><br>g) The plaintiff may file a reply to the defendant's answer.<br><br>h) Discovery procedures are used:<br><br>1. interrogatories<br>2. bill of particulars<br>3. depositions<br><br>i) Pre-trial motions, e.g., motion to disclose, motion to dismiss. | a) Arrest<br><br>b) Investigation<br><br>c) Initial appearance before magistrate:<br><br>1. accused notified of charge(s)<br>2. bail<br>3. right to be silent<br>4. attorney representation<br><br>d) Grand jury--indictment<br><br>e) Preliminary hearing<br><br>f) Plea bargaining<br><br>g) Arraignment<br><br>h) Pre-trial motions, e.g., motion for discovery, motion to suppress<br><br>i) Jury selection--voir dire |

Chart cont'd.

| | |
|---|---|
| j) Efforts at settlement<br><br>k) Pre-trial Conference may be held to crystallize the issues and to attempt a settlement.<br><br>l) Jury Selection--voir dire<br><br>m) Arbitration | |

## 3. Trial Stage (See Chart 3)

The procedures for civil and criminal trials are relatively the same. Again keep in mind, however, that the order presented here and the names used to describe specific components of this stage may vary from state to state.

The first order of business at the trial is the opening statements by counsel (or by the parties themselves if they are not represented by counsel). Normally, the party that has the burden of proof goes first. This is usually the plaintiff in a civil case and the state or prosecutor in a criminal case. (The burden of proof is the necessity of affirmatively convincing the court of one's version of the facts in dispute). In the opening statement, the attorney briefly states what the issues are, what the position of his client is and how he will go about establishing that position.

The party with the burden of proof must then present evidence. At this stage, his evidence must establish a prima facie case which is enough evidence to win if the other side fails to contradict the evidence he has presented. He tries to establish his prima facie case by presenting tangible, demonstrative, or physical evidence (e.g., written documentation, photographs, weapons) as well as by testimonial evidence (i.e., through the oral statements or testimony of witnesses on the stand).

While trying to establish a prima facie case through testimonial evidence, the attorney calls his witnesses for direct-examination. He asks all the questions of the witness on direct. The other attorney will have the opportunity to cross-examine the witness after the direct-examination is complete. In order to establish the relevance of certain physical or demonstrative evidence, the attorney may lay the foundation for the evidence through questions asked of the witness on direct-examination. For example, suppose the attorney wants to admit into evidence certain business records prepared by the witness on his job. Before submitting the records he lays the foundation by asking questions such as on your job, do you prepare records; what kind; do you recognize this document; would you describe it for the court and the circumstances under which you prepared it, etc. The attorney then offers it into evidence.

The other attorney may object to any question asked of a witness. The judge will then make a ruling on the objections raised. The more common objections made during direct-examination are:

a) Being unduly repetative.

b) Asking leading questions (where the answer is stated or strongly implied in the question, e.g., you weren't home at noon, were you?)

c) Asking irrelevant questions that do not pertain to the facts in dispute.

d) Asking questions calling for a conclusion (normally, the witness must state what he knows about the facts and not give his opinions or conclusions about the facts. The exception is the expert witness, e.g., doctor, who can, under certain circumstances, be asked to give an opinion, for example, "was the accused capable of seeing the sign 100 feet away?")

e) Impeaching your own witness (if you call a witness on direct-examination, the strict rule in the past was that you couldn't impeach or attack or discredit him if he surprised you on the stand and said something that hurt your client. This rule has been somewhat relaxed in recent years and is often not strictly enforced).

The rules change soemwhat when an attorney is cross-examining the witness of the other side. Presumably, such a witness is hostile to the attorney cross-examining him and will therefore give him difficulty. Hence he is allowed to ask leading questions, to an extent in order to aid him in dealing with this hostility.

Clearly, the attorney on cross-examination can impeach the witness, since impeachment is the purpose of cross-examination. He cannot, however, ask unduly repetitive or irrelevant questions. (Note that at this point, the other side has not yet presented its case through direct-examination of its witnesses nor through the offering of its own physical evidence. All that has happened is the presentation of the case of the party with the burden of proof and the cross-examination of witnesses by the other side.) There is another rule that often governs cross-examination: the attorney on cross-examination cannot ask questions outside the scope of the subject-matter covered on direct-examination. If on direct-examination, for example, the witness is asked questions about an automobile accident, the attorney on the other side cannot raise new subject-matters on cross-examination such as questions pertaining to slander or libel. This subject is outside the scope of the automobile accident. If the attorney wants to cover slander or libel (assuming it is relevant to the litigation at all) he must do so when he presents his own case after the other side has rested. Like the rule on impeachment, however, this rule is also not always strictly enforced.

Finally, some courts allow the party who initially directly-examined a witness to conduct a brief re-direct-examination after the other side has cross-examined him. The purpose of re-direct

is to give the attorney the chance to rebut what he feels the other attorney tried to accomplish on cross-examination.[7]

At the close of the plaintiff's case (in civil litigation) or of the state's case (in criminal litigation), the defendant can make a motion to dismiss on the ground that the other side has failed (through its physical and testimonial evidence on direct examination) to establish a prima facie case. If this motion is granted, the trial is over. If it is denied, it is the defendant's turn to put on his own case to establish the facts in the light most favorable to his client. The defendant directly examines his own witnesses and the plaintiff subjects them to cross-examination. He introduces his physical evidence at strategic moments. He then rests his case.

Throughout the presentations of cases by the two sides, there frequently are interruptions during which the attorneys argue the legality of procedural and evidentiary points. If a jury is hearing the case, these arguments are usually held outside of their hearing range, either at a bench conference with the judge or with the jury removed from the room. If no jury is involved in the case, then of course, the arguments can be made in the open.

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[7] On how these witness examination rules apply to administrative hearings, see Statsky, W., Teaching Advocacy, supra note 4 at pp.93ff.

Once the defendant has rested and the legal points have been argued the judge must then instruct or "charge" the jury on the standards it will apply in reaching a verdict. Again, if there is no jury, there is no charge since the judge decides everything himself. If there is a jury, its basic responsibility is to decide the factual issues in dispute under the guidance of the judge's charge. The jury is told what standard of proof to apply in resolving the factual disputes. In civil cases, the standard of proof is often the "preponderance of the evidence" which generally means that the jury is more convinced of one version or that it concludes that the existence of a contested fact is more probable than its nonexistence. In some civil cases, the standard is much stronger: "clear and convincing evidence." This standard requires more convincing evidence than the preponderance test. The strictest standard of all is used in criminal cases: "beyond a reasonable doubt." If the jury has <u>any</u> reasonable doubt as to <u>any</u> of the elements of the crime, the defendant is to be found not guilty.

Before or after the jury has been charged, the attorneys make their closing statements in which they summarize their cases, state what they think they proved and what they think the other side failed to prove. Finally, the jurors go off to the jury room to deliberate alone. They occasionally come back into the court to ask the judge to clarify certain points of his instructions to them or to deal with other problems that arise.

When they have reached a verdict, they return to the courtroom to have the foreman of the jury announce it to the court.

In a criminal case, the person convicted is then brought before the judge for sentencing. (In some states, however, the jury may be permitted to set a sentence as well as to determine guilt or innocence). The judge may conduct a separate hearing on the sentence. The person's background, the likelihood of his committing crimes in the future, his degree of repentance, etc. are all taken into consideration in deciding whether to send him to prison, grant him probation or fine him. The attorneys for both sides take turns arguing for the sentence they are seeking. Usually, new witnesses are not called at this hearing, but letters of recommendation, written reports on family and employment background and the like are frequently submitted. The technical rules of evidence and procedure that apply during the trial normally do not apply at this hearing.

In a civil case, the plaintiff will usually be asking for money damages and the jury's verdict will state how much should be awarded. In some states, however, there is a separate damage hearing after the jury has found a party liable. This separate damage hearing will be limited to the amount that the losing party should pay the winner. Of course, if the defendant won, he will not get any damages unless he had a counterclaim against the plaintiff which he won.

The final act of the trial is the judgment of the judge which embodies the verdict of the jury and his determination of what the rights and responsibilities of the parties are.

## CHART 3

## STAGES OF LITIGATION - TRIAL

| CIVIL AND CRIMINAL |
|---|
| a) Opening Statement of plaintiff (civil case) or of the state (criminal case). |
| b) Opening Statement of other side. |
| c) Party with burden of proof presents evidence:<br>1. Demonstrative evidence introduced<br>2. Direct-examination of own witnesses<br>3. Cross-examination by the other side<br>4. Re-direct examination. |
| d) Motion to dismiss for failure to establish a prima facie case. |
| e) Other side presents evidence:<br>1. Demonstrative evidence introduced<br>2. Direct-examination of own witnesses<br>3. Cross-examination by the other side<br>4. Re-direct examination. |
| f) Arguments to jury by counsel |
| g) Instructions to jury |
| h) Verdict of Jury |
| i) Judgment of court |

## 4. Appeal Stage (See Chart 4)

Following trial there is an appeal process.[8] In some systems there is a two step appeal process, first to an intermediate appeals court and then to the highest (or supreme) court in the system. In other systems, only one appeals or appellate court is provided.

Before any appeals are taken, a party may make a motion to "stay" (suspend) the execution or operation of a judgment pending what happens on appeal. In a criminal case where the defendant was sentenced to prison, this motion may in effect ask the court to permit him to remain on bail while he appeals his conviction. In a civil case, where the judgment was that a party be forced to do something, e.g., pay money or build a bridge according to the terms of a contract, the motion to stay execution, if granted, would prevent the winning party from forcing this to be done until the appeal process is over.

By statute, a party usually has a limited number of days, e.g., thirty, from the time judgment was rendered at trial to appeal. To start the appeal, a party serves a Notice of Appeal on the other party and files it with the clerk of the appeals court. The party against whom the appeal is brought is called

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[8] In some situations there can be an appeal before the trial is over. For example, if a party has made a pre-trial motion or a motion during trial which he loses, he may be able to appeal the adverse decision on his motion right away.

the appellee or respondent. The appellant brings the appeal on the issue(s) with which he is dissatisfied.

Normally an appeal is significantly different from the trial. The case is not re-tried on appeal.[9] The purpose of the appeal is limited primarily to questions of law. At the trial, two events occurred: (1) a set of fact were found to be true, and (2) certain law was decided to flow from, or to be applied to, this set of facts. It is the latter that is the major concern of the appeals court. No witnesses are called; no physical evidence is introduced. The appeals court addresses issues such as:

a) Were the right rules of evidence applied by the judge?

b) Did the trial court have jurisdiction to try the case?

c) Did the judge apply the correct law?

An appeals court will entertain a complaint that the evidence was insufficient to support the verdict, but this does not mean that the case is re-tried on appeal. The court will look at the entire record and disturb the facts found to be true only if it concludes that the trial court was irrational in its conclusion.

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[9] There are exceptions to this rule. In some states the appeal is "de novo" which is to say that the party is in effect granted a new trial on appeal.

The vehicle by which the attorneys raise these objections on appeal is the brief. The appellant files a brief; the appellee then files a brief and finally, the appellant may file a reply brief to the appellee's brief. The brief summarizes what took place at trial, states what errors the attorney thinks the trial judge made, provides a legal analysis of why they were harmful errors and states what conclusions the attorney wishes the appeals court to make. By the time the briefs are filed, the entire trial transcript (i.e., word-by-word account of what was said on the record at trial) has been typed and is referred to throughout the brief.

A standard rule in the appeal process is that a party cannot raise legal arguments on appeal that were not raised at trial.[10] Suppose that the one attorney introduced a document into evidence at trial and the other attorney made no objection to its admission during the trial. It is improper for the latter attorney to argue for the first time on appeal that the document was inadmissible according to the laws of evidence even if in fact it was an error for the trial court to have admitted it.[11] He should

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[10] On how this rule applies to appeals from agency hearings, see Statsky, W., Teaching Advocacy, supra note 4 at pp.96ff.

[11] An exception is made, however, where the error committed by the trial court was so fundamental that the trial was unfair. An appeals court will address the issue even though the other side failed to object to the error at trial. This exception is called the plain error rule.

have raised this objection at the trial. For the appeals court to address this issue for the first time would probably require it to conduct a fact finding hearing which it does not want to do. The same is true of new theories or new causes of action against the other party. Suppose that at the trial "A" is suing "B" for breach of contract. On appeal "A" cannot claim for the first time that during his troubles with "B" over the contract, "B" slandered him. "A" should have brought this out at trial in his pleadings and in his evidence, or he should have brought a separate suit against "B." Hence the general rule is: if you should have raised something at trial and didn't, you are deemed to have waived it for purposes of the appeal.

Once the briefs are in, a time is set for oral argument before the appeals court (which may contain three to nine judges, or more). The judges should have read the briefs and done some legal research on their own on the issues of the case.[12] As the attorneys take turns arguing the law before the judges, the latter often interrupt with questions. The parties to the litigation may be present during oral argument, but normally they do not participate in the proceedings.

Finally, the judges withdraw in private to deliberate on the case and to vote. Their decision could take a number of courses. For example:

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[12]Many appellate lawyers would argue, however, that judges seldom do much work on the case prior to oral argument.

a) Affirm the lower court's ruling.

b) Reverse the lower court's ruling and award the judgment to the other side (the appellee).

c) Remand the case (send it back) to the trial court with specific instructions, e.g., conduct a new trial, apply a different law to a particular set of facts in dispute.

This court's decision is usually written and published in official and unofficial editions.[13] If there has been disagreement among the judges on the decision, there may be opinions that dissent from the majority opinion which controls. Some judges may write concurring opinions in which they agree with parts of the majority opinion but wish to state their own separate views.[14]

The next step in the appeals process (if there is any next step at all) is the highest court in the jurisdiction. For cases tried in state courts, the highest court is usually the

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[13] These printed or reported decisions are the primary source material which law schools use to teach law students. The use of these decisions is called the "case method" of learning law.

[14] On reading opinions, see Statsky, W., Legal Research, Writing and Analysis for Law Students and Paralegals: Some Starting Points, pp.57ff. (National Paralegal Institute and Antioch School of Law, 1974)

state supreme court (sometimes called by different names, e.g., New York State Court of Appeals, Connecticut Supreme Court of Errors). If the trial took place in a federal court (the United States District Court), the next step after the middle appeals court (called the United States Circuit Courts) is the United States Supreme Court. As in the case of an appeal to the middle appeals court, briefs are filed, oral argument is made and a final decision is reached by the supreme court.[15]

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[15]The writ often used by this court to indicate its willingness to hear an appeal from a lower court is the writ of certiorari.

## CHART 4

## STAGES OF LITIGATION - APPEALS

| CIVIL AND CRIMINAL |
| --- |
| a) Motion to stay execution of judgment pending appeal. |
| b) Filing of Notice of Appeal with middle appeals court. |
| c) Filing of Appellant's brief. |
| d) Filing of Appellee's brief. |
| e) Filing of Appellant's reply brief. |
| f) Oral Argument. |
| g) A decision is rendered. |
| h) Appeal to highest court within the jurisdiction. |
| i) Briefs filed, oral argument, decision rendered. |

## 5. Enforcement Stage (See Chart 5)

In a civil case, one of the great fears of the party who wins a money award is that he will not be able to collect. The loser does not take out his checkbook immediately upon hearing the judgment against him. Collection is often difficult, possibly involving further litigation. The party who owes money, called the judgment debtor, can be very uncooperative. There are a number of options available to the judgment creditor:

a) Execution: An execution is a document requiring a sheriff or marshal to seize property of the judgment debtor to be sold at public auction with the money to be used to satisfy the judgment of the judgment creditor.

b) Investigative procedures: The judgment creditor can often force the judgment debtor to disclose his income or property. An execution can then be brought against these assets.

c) Garnishment: The judgment creditor may be able to force the judgment debtor to turn over part of his salary until the judgment is satisfied.

d) Contempt: In some cases a judgment debtor may be called before the court and held in contempt for failure to satisfy a judgment.

If money was not involved and the losing party was ordered to refrain from doing something or to do something (other than pay money to the loser), the contempt sanction is frequently used to obtain compliance. Other methods, in addition, could be employed by the court. For example, a court could require the loser to submit periodic reports to the court detailing his progress in complying with the order. Recently a court declared a prison system to be unconstitutional and ordered major improvements in the administration of the system. The correctional administrators who had lost the case were required to submit reports to the court on their progress in making these improvements. Also, a court might appoint a special monitor to check on compliance and report back to the court.

When an administrative agency is involved in the litigation and loses, the attorney for the winning side may have difficulty determining whether the machinery of the agency's bureaucracy is conforming to the court order. This may not be so if, for example, an agency is simply ordered to pay the winning party an amount of money. The problem cases are those that order an agency to change or modify long-standing procedures by which it conducts its business. In a tax or social security case, for

example, the court may place limitations on the way in which investigators can make home visits on individuals they suspect are violating the law. Such limitations can be difficult to enforce. In an agency with many employees, departments and sub-departments, it may be a monumental task to obtain full compliance within the immediate future.

In a criminal case, the court could reach a number of judgments:

--acquittal

--fine paid to court

--restitution to victim

--jail or prison term

--probation

There are enforcement problems involved both from the perspective of the district attorney and the person convicted. If the defendant does not pay the fine imposed upon him, or fails to return to the victim of the crime what he took from him (i.e., failed to make restitution), the district attorney could bring him back into court and ask that he be held in contempt or resentenced to prison. If the individual has been placed on probation (a decision to let the individual remain in the community under certain conditions, e.g., not leave the state without permission, join a job counseling program, support his wife), the probation officer will be supervising him to insure that he is abiding by the terms of the probation order.

An acquittal seldom raises problems of enforcement except in one instance: If the person acquitted is arrested again for the same facts involved in the original case for which he was found not guilty. Upon re-arrest, he often claims that he is being placed in double jeopardy which is another way of saying that the state is not enforcing the original acquittal judgment.

A person sentenced to jail or prison may also have enforcement complaints against the state, the major of which deals with sentence computation. The judge may order that the person be given a sentence of five years with credit for "time served" while waiting for trial. The state may also have "good time" provisions, by which an inmate has a certain number of days taken off his sentence for every month of good behavior. Taking all these factors into consideration, it is not infrequent that correctional personnel make mistakes in calculating the time that must be served. The inmate must put pressure on the prison to re-do its calculations, or file a habeas corpus action in court charging that he is being kept in prison longer than the judge's sentence contemplated.

# CHAPTER 5

## STAGES OF LITIGATION - ENFORCEMENT (COMPLIANCE)

| CIVIL | CRIMINAL |
|---|---|
| a) Execution | a) Contempt |
| b) Investigative proceedings | b) Re-sentencing |
| c) Garnishment | c) Revocation of probation |
| d) Contempt proceedings | d) Raising the defense of double jeopardy |
| e) Periodic reports | e) Sentence computation --informal pressures on the prison --habeas corpus proceeding |
| f) Appointment of monitor | |
| g) Subsequent compliance litigation | |
| h) Informal pressures on the judgment debtor | |
| i) Informal presures on the administrative agency | |

# CHAPTER TWO

## INTRODUCTION TO LITIGATION ASSISTANTSHIP

1. Litigation can be very complex.

Generally speaking, the "easy" cases do not get litigated. It's the tough ones that find their way into the dispute settlement mechanism that we call litigation. The paralegal will probably have manuals, guidelines, checklists and forms available to him to assist the attorney on such cases, and, as we shall emphasize below, it is essential that he know how to use them. He will need all the help he can get to stay on top of the numerous questions involved in many cases that are litigated. What are the facts? What facts are relevant? What facts can be introduced into evidence? Which of these admissible facts will a judge or jury believe? What facts will the other side introduce? Should the case be settled? Have there ever been similar cases litigated? What result did they reach? How are these cases similar or different from yours? What law will govern the facts that may be established at trial? These questions, and the network of variables possible in each question,

necessitate considerable skill in the design of litigation strategy.

When a paralegal is assigned a task to perform by his supervisor, he will invariably find that no matter how precisely his supervisor defined the task, it leads him into other tasks, other questions, other unknowns, other problems that need to be dealt with in order to complete the assigned task effectively. To say that the answer to every question has within it the seeds of another question is not to argue that the process of litigation is by definition chaotic. It is to say, however, that the process is very much alive, very much in a state of flux and very much in need of people who can keep up with, and indeed, who can keep one step ahead of, its developments. The lesson for the paralegal is relatively simple: keep an open mind. Recognize that the way problems were solved in the past may not be the best way to solve the problem you have been assigned. Sense the need to adapt to the circumstances. Above all, do not be frightened when you are not able to fit the reality into the mold that you had anticipated or that others had led you to believe would exist. When the reality jolts your preconceptions in this way, you have received the unmistakeable signal that the problem is calling for more imagination from you.

2. Like the incoming lawyer fresh out of law school, the newly hired paralegal may have considerable anxiety about litigation at first.

It will probably surprise paralegals to discover that law school, by and large, does not train law students to be litigators. Law schools tend to concentrate on the theory of law and legal analysis at the expense of the practical skills that the lawyer will need to represent clients. Prestigeous law schools often look with disdain on practice-oriented training. The development of clinical programs, however, in which student handle "real" cases while in school, has helped to change this somewhat. Yet it is still true that law firms must continue to devote substantial resources to skills-training for their newly hired attorneys because law schools have not been practice schools. The new lawyer, therefore, enters his first job with not a little anxiety. He looks for every opportunity to find ways to translate the theory that he has learned into practice. One of the best examples of the frustration he experiences comes when he makes his first appearnace in court. To his great dismay, he often discovers that a good deal of court procedure is not written down anywhere, or if it is written down, it is not easily accessible. Everybody assumes that everybody else knows the intimate workings of the operation of the court.

In a very real sense, the paralegal has a potential ally in the new attorney. The paralegal should watch his development closely and try to become part of the formal or informal training program that the law firm has set up for him. To be

sure, the complexity of the initial assignments given the new attorney will probably greatly exceed that of the assignments delegated to paralegals. Nevertheless, the paralegal who is willing to take the iniative will undoubtedly discover that there are "chunks" of the new lawyer training that could very nicely fit into his own development and training.

3. Find, study and at least partially understand a completed case file.

As soon as possible after a paralegal enters the job, he should ask someone to give him a completed case file of a case that was litigated. The file may be anywhere from a half inch to six inches thick--or much more if typed transcripts are involved. Normally a file will be organized chronologically in reverse with the most recent letter or document from the case on top. Whatever filing arrangement is used, the paralegal should look at every item in it and try to determine from its cover or first sheet where it fits into the litigation process. Use the charts of this text as a guideline. Have you picked up a brief? For what court? Is this letter an offer of settlement? etc. Whenever the paralegal is not sure what a particular item is from its cover, and reading a page or two does not help, he should ask someone in the office.

As each item is identified, write it down on a piece of paper with its relevant date beside it. Then go back on a separate

sheet sheet of paper and arrange all of the items chronologically. The result will be the biography of a case in litigation. If the file that the paralegal happens to be studying already has its own itemized biography, he should ignore it until he has attempted to write his own. This exercise is important because one of the most vital functions a litigation assistant can perform is information retrieval from the files of current or past cases.

4. Many law offices have their own forms and manuals.

It's quite possible that a paralegal could be told, upon entry on the job, to forget everything he has leanred about forms and procedures in a particular area of the law because the office has developed its own unique forms and procedures that he must learn to use. There are certain forms that practically everyone in the area uses. Sometimes a court will issue its own forms and require that they be used. The paralegal will invariably find, however, that the office has developed its own system of practice forms and procedures intermixed with those that are commonly used or required in the area. It is essential that the paralegal learn the system used by his office as soon as possible.

The system may be highly structured with checklists, forms and instructions placed within a large manual or a series of

manuals. On the other hand, the "system" may be scattered throughout the office in bits and pieces. There may be a checklist buried in one of the files. Copies of forms may be available but without any clear indication to a newcomer of what the form is used for. No one in the office has taken the time to coordiante the system into a central manual which is kept up to date. The "how-to-do-it's" are all in the minds of office staff, and since the staff is coordinated, the system works. The problem for the newcomer is that he can't rely on a unified manual because it doesn't exist. The mandate for the paralegal in this situation is clear: collect as many forms and instructions as do exist, determine if they are still valid and for what purposes, encourage the staff to centralize the system or systems into manuals. *In the meantime, the paralegal is collecting and building his own manual.* He may well find that after a year or so on the job, his manual will become the nucleus of the manuals that should have existed when he first arrived.

Having extolled the virtues of manuals, forms and centalized procedures in this way, there is a need to remind ourselves of the possible liabilities of these tools:

a) They can quickly become out of date.

b) They can be incomplete.

c) They may be poorly written.

d) Certain attorneys in the office may disagree with them and refuse to follow them, or portions of them.

e) They can be misleading in the sense that the user is tempted to follow them slavishly rather than adapt them to the needs of the problem.

5. There is a paramount need for the paralegal to "feel" the interconnections among the events in the litigation process.

It's one thing for the paralegal to be told or to read that field investigation is related to what happens at trial;[16] it is quite another to see the connection in operation, to experience the way in which the pieces can fall together or fall apart. Hopefully, the paralegal will be given the opportunity to make site visits to courtrooms, clerks' offices and to wherever the stages of litigation take place. These should not, however, be tourist orientations. The paralegal should make every effort to make his trip as meaningful as possible. When he watches an office attorney cross-examine an adverse witness at trial, for example, he should read beforehand any deposition that may have been taken earlier by the attorney of this witness. If he is watching an attorney take a deposition, he should read beforehand any field investigation reports that involve the person being deposed. If he is watching an attorney give oral argu-

[16] See Statsky, W., Investigation in a Law Office: A Manual for Paralegals (National Paralegal Institute and Antioch School of Law, 1974)

ment before an appellate court, he should beforehand read segments of the trial transcript which the attorney says will be relevant to his oral argument. Normally, any single item in the litigation process relates forward and back to other items and events. The paralegal's goal should be to sense this interconnectedness as soon and as often as possible.

6. It is no vice for the litigation assistant to be obsessed by dates and time.

When did you receive that? What time did you speak to him? When can he be available to testify? When was this written? When do I have to be there? Can it be postponed, and if so, for how long? When was the photograph taken? When does this have to be filed? How much time does the statute give us to object? How many days do we have to appeal? Are weekends included in the number of days that you have? When will the lab test be ready? How long would it take if you send it special delivery?

It is almost impossible to overstate the importance of time in the litigation process. So many decisions are based upon when things are due. The clock is a pervasive third party in most cases in litigation. The litigation assistant should develop an awareness of this reality and the self-discipline to record dates that are or that could be significant. Many offices

have devised "tickler" systems which alert the office to due dates and other time requirements. The paralegal should learn how the tickler functions. If there is no adequate tickler system in the office, the paralegal should learn how to develop one for the cases he is working on.

7. Learn how to "peek over someone's shoulder" creatively; learn how to observe.

When a paralegal completes his formal education, he will find himself in the position of graduates of most training: there is a staggering amount to learn on the job. The formal education is a very useful starting point. Hopefully, it provides an overview, guidelines and specifics where appropriate. It is absolutely essential that the formal education also prepare the student for the self-training that will be his responsibility when he is hired.

One component of this self-training for the litigation assistant is learning how to watch someone else do something and to translate what he is seeing into the skills that he will need to be an effective litigation assistant. The checklist on chart 6 is designed to assist the paralegal in observing creatively. He should use it as a guideline, particularly during the early stages of his employment.

## Chart 6

## Checklist for Effective Observation

| WHAT YOU HAVE SEEN | WHAT YOU HAVE READ (other than published library material) |
|---|---|
| 1) Describe briefly what you saw.<br>2) Who was doing it? Name everyone involved or participating.<br>3) What stage or stages in the litigation process were involved (agency, pre-trial, trial, appeal, enforcement)?<br>4) Describe how you think it fits into the stage or stages.<br>5) What written documents (already prepared or drafted) were connected with what you saw?<br>6) Find those documents, read them and determine if what you saw makes any more sense to you.<br>7) What written documents (not yet prepared) were referred to as ones that had to be prepared?<br>8) Why do these documents need to be prepared?<br>9) Ask whoever is going to prepare these documents to let you see them when they are finished. Read them and determine if what you saw now makes any more sense to you.<br>10) What facts were involved in what you saw?<br>11) Make a note of everything you don't understand about what you saw and ask people to help you understand them.<br>12) Is there a formbook or a manual available that describes any aspect of what you saw?<br>13) Ask someone to direct you to material in the library which provides a legal basis for some aspect of what you saw. | 1) Summarize briefly what you read.<br>2) Who wrote it? Was it written in-house or by someone else?<br>3) What stage or stages in the litigation process were involved (agency, pre-trial, trial, appeal, enforcement).<br>4) Describe how you think it fit into the stage or stages.<br>5) Will it be re-written by someone? If so, why? What's wrong with it as now written?<br>6) What are the significant dates involved in it?<br>7) Make a note of everythink you don't understand of what you read and ask people to help you understand them.<br>8) What version or versions of facts are involved in what you read?<br>9) Ask someone to direct you to material in the library which provides a legal basis for anything that is contained in the writing you read. |

# CHAPTER THREE

## LITIGATION ASSISTANTSHIP: AGENCY STAGE

At the time when the office is contacting the agency (when an agency is involved at all) no one, of course, knows whether the case can be resolved at the agency stage or whether it will end up in court. How much an attorney will delegate to a paralegal on such a case will depend, in part, on how complex the case is and what the likelihood is that the case will be litigated in court. The more complex the case is and the more it appears that the courts will be involved, the attorney will be less likely to delegate large tasks to the paralegal even though under the regulations of the agency in question, a person may not have to be an attorney to represent clients before it. If, however, the paralegal has considerable expertise in the law and practice of that agency, the office may allow him to handle most of the case himself. For purposes of this discussion, it will be assumed that the paralegal will not be conducting the entire case as representative, but that he will be assisting a lawyer throughout.

Following the initial client interview, there is often a need for the office to know more about the agency involved at two levels:

1) Knowledge about the functions and structure of the agency;

2) Knowledge about the agency's contacts with and decisions concerning the client.

The first concern may not be applicable if the agency is relatively small or if the office has often dealt with the agency before. If not, then there are a number of things that the office may want to know about the agency:

a) Who funds it?

b) Who runs it and who are the senior staff? What power do they have?

c) What are the application procedures? What forms are used?

d) What are the revocation or termination procedures? What forms are used? Do they have formal hearings? Do they have other kinds of hearings?

e) How does the agency make its regulations? Are they published?

The paralegal can assist the attorney obtain answers to such questions in a number of ways. He can go to the agency or write for information literature published by the agency. He can call agency personnel with specific questions. He could check with people outside the office and outside the agency who are familiar with the agency. Finally, he could go to the law library and do some legal research on the agency.[17]

As for the agency's contacts and decisions on the client's case, much of this information can be gotten from the client himself. Information that is usually needed include: date of first contact, agency personnel working on client's case, dates of meetings and phone calls, copies of letters, etc. The paralegal may also be asked to contact agency personnel who have dealt with the client in order to get their precise position, or to determine the extent to which they are confused about the case.

Field investigation to uncover and verify facts is a critical function that must be undertaken.[18] As the attorney tries to resolve the case informally with line and upper echelon personnel, his ability to make specific reference to facts will probably go a long way toward avoiding a formal hearing. The same is true in those criminal cases where there is some contact

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[17] See note 14 supra

[18] See note 16 supra

between the district attorney and the client's attorney before arrest or indictment. Bringing certain facts (uncovered in field investigation) to the attention of the D.A. may help him to decide if he will prosecute or what changes will be brought.

# CHAPTER FOUR

## LITIGATION ASSISTANTSHIP: PRE-TRIAL STAGE

The litigation assistant plays his greatest role at the pre-trial stage after administrative remedies (procedures) have been exhausted. Most of his tasks involve fact finding, fact analysis, drafting and legal research.

In addition, the assistant is often asked to file papers and serve parties. Numerous pleadings (complaint, summons, affidavits, motions etc.) must be filed in court and on the other party (usually on the party's attorney). The main responsibility in court filings is to learn the structure of the courts. The paralegal doesn't simply walk up to the court room door and hand the papers over to an official. He must find the appropriate clerk's office. He may have to pay a fee, obtain a receipt and have a number assigned to the case, or see to it that a number initially assigned is used again for subsequent filings. Simple as these tasks may seem, the civil service structure of court bureaucracies can complicate matters considerably. Often there is no substitute for becoming friendly with a court clerk

so that one can receive recognition and assistance when needed.

Serving or delivering papers on parties to litigation is a very technical undertaking. The paralegal must take great care in carrying it out. Normally, service must be made in person. If personal service is not possible, then the law of the jurisdiction in which the paralegal is working must be consulted to determine when substitute service (e.g., by mail, by publishing a notice in the newspaper) is valid. The person who executes service usually must file an affidavit in court swearing that he did serve the party, and he may have to appear in court to give testimony on his execution of service.

There are seven major tasks that a litigation assistant could be asked to perform:

1. Fact Retrieval and Fact Digesting
2. Calendar Control and Scheduling
3. Organization and Coordination of Exhibits
4. Drafting Interrogatories and Replies to Interrogatories
5. Drafting Pleadings
6. Fact Investigation
7. Legal Research

The remainder of this section will cover primarily the first four of these tasks. The reader is referred to other texts on

legal writing,[19] legal research[20] and fact investigation.[21]

1. Data Retrieval and Fact Digesting (See Chart 7)

As soon as a law suit gets underway, letters, memoranda, affidavits, and other documents are collected at a rather fast pace. In a law office that does a lot of litigation, the filing problems presented by this volume of documents can be enormous. It's often very difficult to set up a usable index system to let someone know what's in a file. Furthermore, even with a good index system, portions of an active file may be scattered throughout the office on the desks of people working on the case. The data retrieval function involves a confrontation with this document maze. "Has the defendant filed his counterclaim?" A rather innocent question such as this can pose some complex problems. Similar questions could also be asked of cases that are no longer active, but which the attorney may feel might be a bearing on an active case. Several basic guidelines should be part of the paralegal's standard practice when engaged in data retrieval assignments:

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[19] See note 17 supra

[20] Id.

[21] See note 16 supra

a) Have a comprehensive knowledge of the office's filing system (and while obtaining this knowledge, be sure you know who in the office already has it so that these persons can be consulted). Is there an index system? Is there a cross-index system? Are there file summaries available?

b) Have a comprehensive knowledge of the five stages of litigation and the most common documents involved in each stage.

c) If possible, find out who wrote the document that contains the data you are seeking. Ask him for leads.

d) Determine whether the data you are seeking may be found in more than one document, and if so, look for each such document.

e) Recognize that data in a file may be contradicted by other data in other documents. To determine the most current status of data, the paralegal can start with the most recent documents in the file and work back.

The person trying to retrieve data must know how to interpret missing documents as well as documents that are present. If

the paralegal knows what documents should generally be found in a file, he will have a sense for what documents are conspicuously absent. The document may be lost, may be in use by someone in the office, may be on its way to the files or may be in the process of drafting or re-drafting. An understanding of the chronology in which documents are normally prepared can be very helpful in determining whether something is missing. Paradoxically, it takes considerable skill to be able to determine whether something is missing.

The fact digest assignment essentially involves the preparation of a file or case profile. An attorney may want a summary of everything that happened in the case, or he may want something much more specific, e.g., read a deposition and pick out the salient points in a witness' testimony.

In preparing general fact digests, it goes without saying that all of the skills necessary for the data retrieval function must be at the command of the person preparing the digest. He can't digest what he can't find. The paralegal's supervisor will instruct him on what kind of digest he wants. A number of possibilities exist:

a) Make a list of all the papers prepared and filed with the dates of preparation and/or of distribution.

b) Go through all the documents and summarize everything said about a specific topic, e.g., a particular company.

c) Summarize every document in the file.

d) A combination of the above.

At an absolute minimum, most digests should include:

--name of case

--name and address of client and other parties

--date the office became involved

--the file number

--courts involved

--attorneys working on case

--nature of the suit

--the essential facts

--documents thus far filed

--documents in preparation

--the next event(s) in the suit

A common digest assignment is to read deposition testimony or answers to interrogatories and summarize what is there according to a number of possible themes. Guidelines on this task are found in chart 7.

## CHART 7

## CHECKLIST FOR ANALYZING/DIGESTING DEPOSITION TESTIMONY AND ANSWERS TO INTERROGATORIES

1) Has the witness been consistent?

2) Has the witness been evasive?

3) Trace what the witness says about a particular topic.

4) List the chronology of events accordings to the witness.

5) Has the witness been incomplete in his answers?

6) Based upon the above analysis, what questions would you recommend that the attorney ask this witness at a later time, e.g., at the trial on cross-examination?

7) Based upon the analysis, what questions would you recommend that the attorney ask other witnesses to determine the validity of what was said?

8) Compare what this witness said (or failed to say) with what the client has told the office and with what has been uncovered in field investigation. Based upon this comparison, are there inconsistencies or gaps? What further questions need to be asked and of whom?

2. Calendar Control and Scheduling

Calendar control involves feeding relevant dates into the office tickler system and/or maintaining your own calendar of events, past and to come. Lawyers need constant reminders of due dates, particularly when a lawyer is working on more than one case or more than one attorney is working on a single case.

Scheduling events is sometimes assigned to the secretaries in the office, although for complex scheduling problems, the paralegal may be involved. Some of the more common events that need scheduling and coordination are as follows:

a) arranging for the taking of a deposition or an informal interview with a prospective witness;

b) arranging for the arrival of an expert witness;

c) arranging for the client to take a physical examination;

d) sending out reminders to clients and witnesses on events scheduled;

e) notifying individuals of postponements of cancellations of events scheduled;

Scheduling a single event may involve the coordination of the calendars of a large number of people. This must be done not only in reference to the time that the individuals have available,

but also with an eye on court due dates and on the preparation of in-house documents which cannot be completed until the event to be scheduled has occurred and the data on the event is made available.

3. Organization and Coordination of Exhibits (See chart 8)

Before an attorney goes to trial, he must have all physical evidence and exhibits in order and ready for his trial presentation. In the unfolding of events at trial, he may determine that some of his exhibits are no longer necessary or that others are required. In any event, the exhibits that he thinks he might use must be prepared. Chart 8 presents a number of guidelines for the paralegal in assisting the attorney in this task.

## CHART 8

## GUIDELINES FOR PREPARING PHYSICAL EVIDENCE AND EXHIBITS FOR TRIAL

1) Ask the attorney in what order he would like them prepared. Possible arrangements:

   a) Separating those that he might introduce into evidence from those that he will definitely try to introduce.

   b) Arranged chronologically in the order that he expects them to be introduced at trial.

2) Prepare a summary sheet for each item containing:

   a) the name of the case it will be used in.

   b) a brief description of what it is.

   c) a brief analysis of what facts the attorney will try to use it to help establish at trial.

   d) the source of the item (who wrote it, where was it obtained etc.?)

3) Describe what facts the attorney will have to establish in order to lay out the foundation for the item before he tries to introduce it, i.e., to show that it is relevant to the facts in dispute, e.g., if it is a writing, what verification exists to show that it is authentic?

4. Drafting Interrogatories and Replies to Interrogatories (See Charts 9 and 10).

Considerable skill is required in drafting and replying to interrogatories. Each task has an opposite objective: in drafting interrogatories you want to get as much information as possible from the other side, while in responding to interrogatories, you usually want to say as little as possible. One major qualification exists on the reply task, however. If the attorney instructs the paralegal to reply with full openness and candor, he obviously does so. As a matter of strategy, the attorney may decide to be fully cooperative in order to encourage the other side to take a certain position. Suppose, for example, that the attorney wants to impress the other side with certain facts in order to encourage them to settle. This objective could call for a certain openness in the responses to the interrogatory questions which might not otherwise apply. See charts 9 and 10 on guidelines in drafting and responding to interrogatories.

Of course, the work done by the paralegal in this area will always be checked by the attorney and by the client who will be ultimately responsible for the answers given.

## CHART 9

## GUIDELINES ON DRAFTING INTERROGATORIES

1) Obtain general and specific instructions from your supervisor on the drafting.

2) Read all the documents on the case that have been prepared thus far (e.g., client interview report, field investigation report, complaint, answer).

3) Look at drafts of other interrogatories that have been used in other cases that are similar to your case.

4) Recognize the need to adapt other interrogatories to the peculiar needs of your case.

5) Start out with requests for basic data, (e.g., name, address, age, occupation etc.).

6) Try to avoid questions that call for simple yes/no answers.

7) Try to avoid questions that call for an opinion from the respondent unless the opinion might be relevant or provide leads to other facts.

8) Phrase the questions to elicit facts.

9) Know what facts will be necessary to establish your client's case, and ask specific questions focusing on those facts.

10. As to each fact, ask questions calculated to elicit the respondent's ability to comment on the fact (e.g., how far away was he, does he wear glasses, etc.).

11) Phrase the fact questions so that the respondent will have to clearly indicate whether he is talking from first hand knowledge or hearsay.

12) Avoid questions on topics that you know or reasonably suspect will result in damaging answers if no other purpose will be served thereby.

## CHART 10

## GUIDELINES ON RESPONDING TO INTERROGATORIES

1) Obtain general and specific instructions from your supervisor on drafting the answers.

2) Check all proposed answers with available documents (e.g., report on client interview, field investigation reports, complaint).

3) Do not volunteer information beyond the confines of the question unless necessary to clarify a position (e.g., when a simple answer would be damagingly misleading without the clarification).

4) When an answer to a question is not known, say so.

5) Preface most answers by saying "to the best of my knowledge," or "as far as I can recall" in order to provide some leeway if the facts provided later prove to be invalid.

6) Recognize that the other side will try to use your answers to get you to commit yourself to a position which he will try to impeach you on at the trial.

7) Recognize the standard improper questions which you do not have to answer unless a court orders an answer. For example:

   a) clearly irrelevant matters

   b) repetitive questions

   c) derrogatory questions

   d) questions calling for expert opinion

   e) questions inquiring into the attorney's work product, e.g., questions that ask for the attorney's legal opinion or that ask for copies of legal memoranda.

Chart 10 cont'd.

f) questions that expressly or impliedly call for a violation of the attorney-client privilege, e.g., "what did the client tell his attorney," and vice versa.

# CHAPTER FIVE

## LITIGATION ASSISTANTSHIP: TRIAL STAGE

An assistant's role at trial depends, in part, upon the involvement that he has had with the case up to trial. If the involvement has been minimal, then he may not have much to do to assist the attorney at trial. If, on the other hand, he has been working closely with the attorney on the case all along, his role at trial could include a number of tasks:

a) Monitoring all the files, documents and evidence which the attorney will need to present his case, to plan and to re-plan his strategy.

b) Do some spot legal research on issues that come up during the trial that require an answer fairly quickly.

c) Prepare preliminary drafts of certain motions and other documents that are required during the course of the trial.

d) Assure the presence of witnesses and assist the attorney in preparing them for his direct-examination, and in anticipating what may be asked of them on cross-examination.

e) Take notes on the testimony of certain witnesses. The attorney may be able to use these notes in his preparation for other segments of the trial. Normally he must rely on his own memory because of time needed by the court stenographers to type the minutes of the proceedings.

f) The assistant may make suggestions to the attorney on what questions to ask a particular witness based upon the assistant's close following of what has happened thus far in the trial, and based upon his involvement with the documents and files of the case prepared during the pre-trial stage.

In a criminal case where the defendant is convicted, considerable work will have to be done in making the case for the most favorable sentence possible which will usually be probation. Judges are normally reluctant to send a man to prison if alternatives to incarceration are available.[22] (This, of

[22] See Singer, R. and Statsky, W., Prisons and the Therapeutic State: Cases, Materials and Directions (Bobbs-Merrill, 1974)

course, would not apply to cases where the judge is mandated to impose a prison term or where the nature of the crime and the individual's prior criminal background make it unlikely that the judge would consider alternatives to prison). The judge will be primarily interested in the person's "social history" and prospects for living a clean life if granted probation. The paralegal can be sent into the community to track down data such as:

1) Are there vocational training programs available and willing to accept him?

2) Will his old employer take him back?

3) Can he go back to school?

4) Will his family or other relatives take him in?

5) Are there clergymen, school counselors, community leaders who would be willing to take an interest in his progress, e.g., will they state that they will take some initiative in inviting him into their activities?

The judge is not going to be inclined to release the person into the streets without assurance that there will be people and programs available to support him in addition to the supervision that would be provided by an overworked probation officer. The

paralegal can be of great help in identifying these resources.

In addition, there may be vague references during the sentencing hearing to prior criminal involvement of the person which is not adequately supported by the documents. Since the strict rules of evidence do not apply to the sentencing stage, such references may be considered by the judge unless someone has taken the time to track down the underlying facts which support or deny the allegations. The paralegal can be asked to do this; he will make his report to the attorney who will clarify such matters at the hearing.

# CHAPTER SIX

## LITIGATION ASSISTANTSHIP
## APPEAL STAGE

One of the key functions served by the paralegal at the appeal stage is data retrieval and fact digesting. After the trial, the attorney who is dissatisfied with the trial judgment plans appeal strategies. The trial may have lasted anywhere from a day to a number of weeks. Throughout the trial the attorney applies two tests to practically everything he does:

1) How can I use this effectively to win?

2) How can I take a setback during the trial and turn it into a theory to be used on appeal?

The second test will require the attorney to go back after the trial and reconstruct, from all the documents and testimony, the data that will support his theories on appeal. Here the paralegal's data retrieval and fact digesting role can be invaluable.

The attorney may ask the paralegal to go back over the record and do the following:

a) Make a list of every time I objected to something during the trial. Include the page number where my objection is found, a brief summary of what my objection was and the ruling of the judge on my motion.

b) Make a list of every time opposing counsel made reference to a particular topic, e.g., the plaintiff's prior involvement in other litigation.

c) Make a list of every time the judge asked questions of witnesses.

A great deal of legal research is usually required before the attorney writes his brief for submission to the various appeals courts. The paralegal could be very helpful in a number of areas:

a) Research the history of relevant legislation.

b) Shepardize cases and conduct cite checking.

c) Read over briefs to cross-check accuracy of quoted testimony from the typed transcript of the trial.

d) Conduct legal research on assigned issues of law.

e) Monitor the typing, printing and filing of briefs.

## Chapter Seven

## Litigation Assistantship: Enforcement/Compliance Stage

In civil cases where the judgment required an administrative agency to do something or to refrain from doing something with respect to the client, someone must check to see that the judgment is carried out. If it is not, the client may call the law office for help. The client, however, may be confused as to exactly what the agency has to do or when it must do it. The paralegal may call the client to find out what has happened since the judgment (or since the appeal process ended). If difficulties have arisen, the attorney must be notified in order to decide whether further action is warranted. The agency may have to be contacted to find out what their position is, e.g., why the delay? The paralegal could be asked to undertake this task. It may be that the attorney will have to plan further litigation in order to enforce compliance with the judgment.

If a money judgment was awarded to the client, then considerable work may be required in collecting from the judgment

debtor. The paralegal can arrange for the sheriff to deliver an execution. The judgment debtor may be ordered by the court to submit to an examination of what his assets are. Investigation work will probably be required to determine what assets exist, where they are, and how they might be reached. In some cases, the attorney may petition the court for the contempt order against the judgment-debtor for non-compliance. The paralegal can help in putting together the factual basis to support this charge and in drafting some of the court papers involved.

In criminal cases, unfortunately, the inmate rarely has the assistance of counsel in insuring compliance of the prison to the sentence. Very often they are their own lawyers or they act as paralegals for each other in providing the needed assistance to challenge issues such as sentence computation.[23]

At probation revocation proceedings, the probationer is usually represented by counsel. A good deal of field investigation work may be required to check the probation officer's charge that the probationer violated the conditions of probation.

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[23]See Statsky, W., "Post-Conviction Remedies and Corrections Law" in What Have Paralegals Done: A Dictionary of Functions p.19.1 (National Paralegal Institute, 1973).

# APPENDIX

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